**EFFECT OF MAC CLAUSE ON M&A TRANSACTION IN COVID 19 PANDEMIC PERIOD**

**What is the MAC clause?**

*Material Adverse Change* (“MAC”) is a provision, which can be easily found in Mergers and Acquisitions transaction (“M&A”), allows buyer has right of withdrawal from a sale and purchase agreement (“SPA”) signed but incomplete or to affirm guarantee request in case there is a serious adverse change of target company.

It is necessary to distinguish between the MAC clause from MAE clause – *Material Adverse Event*. Whereas the MAC clause bases on the adverse changes’ existence during the time from the signing to the end of the SPA, the MAE clause regularly includes adverse issues that have existed before the SPA was signed but in ambiguous until the SPA starts to be performed.

**Function and content of MAC Clause**

For specific purpose, the MAC clause regularly contains a list of examples about the adverse changes which will be explicitly mentioned or excluded from the scope of the clause. According to the nature of the changes, the MAC clause is usually divided into Business MAC – the changes related to the line of business of the target company, such as a lack of business license, loss of essential contract; or Market MAC – the changes exceeds business process due to market of the target company, including natural disasters, conflicts, economic recessions; or Compliance MAC – serious violations regulation of the target company’s compliance regulations; in some intensive transactions, there may be many issues mentioned as a MAC event, e.g., the financial effect of sale and purchase transaction – Financial MAC.

The decision of whether the MAC and the SPA should be made or not depends on (i) the negotiating position of the parties and, in particular, the party having the responsibility of the gap between exchange and completion, (ii) the nature of the target company’s business activity. However, almost all the SPA usually contains a MAC clause and this can be expressed through the buyer’s right of withdrawal/cancellation of the SPA when one of the transaction closing conditions is not adopted by a certain day (long stop date).

As usual, the MAC clause is almost not offered by the seller, because this can run a risk to them when serious adverse changes happen during the signing and performing process of the SPA. If the seller agreed on the MAC clause, they have to consider how to keep the scope of provision as narrow as possible and limit it under possible control, usually related to business activity – Business MAC. And obviously, the buyer’s interest includes a MAC clause that is as sufficient as possible and unlimited, not only in the target company’s particular cases but also in processes or general economic development and relates to its industry.

**Activation of MAC Clause in Covid 19 Pandemic period**

In recent years, the M&A market in general and in Viet Nam in particular is quite exciting and usually more “in favor of” the seller, so it is difficult for the buyer to have a negotiation of putting the MAC clause into the SPA and only, put the provisions drafted with the available general standard content (boilerplate text). However, this is changed when a serious adverse and unpredicted change happened: the Covid-19 pandemic.

At the moment of this article, it can be seen that following to tendency of the transactions soon, the buyer may want to be protected by the additional closing conditions, right of cancellation, and/or corresponding guarantees under the expanded MAC clauses to deal with the predicted economic recession caused by the COVID-19 pandemic and instabilities led to when acquiring the target company. Currently, with the extent of unpredictable economic consequences, it is difficult for the seller to absolutely refuse the buyer’s increasing demand with baseless reason. Therefore, the COVID-19 pandemic can be absolutely a factor accelerating to put the MAC clauses into the SPA.

For the performing transactions, it is necessary to consider, based on the contract current situation, whether the buyer can withdraw from the signed agreement if the target company’s economic ability is seriously adversely changing by the COVID-19 pandemic. Can the COVID-19 pandemic create the right of withdrawing and refunding for the buyer based on the MAC clause? This depends on particular terms in the signed MAC clause. In usual, the popular MAC clauses do not explicitly include the case of global negative effect caused by a viral infection; or even when the MAC clause does not explicitly exclude the cases of the pandemic, there is still a question of whether the COVID-19 pandemic belongs to the scope of the MAC clause or not, when the COVID-19 pandemic, although having a natural origin, still bring out doubt and is difficult to be treated as a natural disaster, e.g., an earthquake or storm regulated in the Market MAC.

**Drafting consideration of the MAC Clause about the COVID 19 Pandemic Response and the similar Cases**

For the drafting of the SPAs in the future, it is considered whether the hidden effect of the COVID-19 or the similar pandemics should be regulated or not and what kinds of conditions can be requested in contract negotiation and performed in the later period.

*The point should be considered by the buyer*

When drafting and negotiating the MAC clause in the SPA, the buyer should consider:

1. Carefully use the definition of what constitutes the MAC and should consider the inside provision under the general agreement because this can be understood in a general and narrow meaning, and should be understood and explained under a unified form of the SPA.
2. Expand the list of the MAC clause by, e.g., “mass spread of the disease”, “a significant disruption of the supply chain”, “business prospect of the target company”; or in case the seller successfully negotiates the events in the general market (Market MAC) to be treated as an exception to what constitutes the MAC, the buyer should consider about terms combination in the SPA which will still activate the MAC clause if: “the target company is affected quite worse than other companies in the same industry”; or “the target company's line of business is disproportionately affected when compared to other industries”. Otherwise, the risk is running that the buyer cannot timely withdraw from the sale and purchase agreement because the target company’s business data are still unaffected even at the termination time of sale and purchase contract, although a declining tendency in the respective market was foreseeable.
3. Consider other safeguards that can be available to the buyer, e.g. the seller commits the target company’s operation in the period before the transaction is completed or prolongs the negotiation of the seller’s commitment guarantee after the transaction is completed.

*The point should be considered by the buyer*

The seller can look at the following points after considering and negotiate the MAC clause:

1. In case it is unavoidable to include the MAC clause into the SPA, the MAC clause should be limited to the internal circumstances of the target company (Business MAC, Compliance MAC). The adverse changes in the general economic situation of the respective market (Market MAC) should be explicitly excluded from the scope of the clause.
2. It is necessary to give particularly essential thresholds, that means the thresholds that the buyer only has the right to withdraw from the transaction when situation activating the MAC clause or the similar event leading to the decline is determined by financial data with a specific number, and in obvious, this situations or event is not a short-term adverse, according to the independent opinion of an expert in the same industry.
3. Provision drafting forces the buyer to pay damages agreed on the contract in case the MAC causes the buyer’s withdrawal and refund.